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COMMITTEE PRINT

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OF THE
97th CONGRESS

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FOR THE USE OF THE
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COMMITTEE ON THE JUDICIARY

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LETTER OF TRANSMITTAL

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C., February 5, 1982.

DEAR COLLEAGUE: Pursuant to Senate Resolution 305 adopted by the Committee on the Judiciary on January 29, 1982, I have filed with the Committee on Rules and Administration an outlined program of activities for the Second Session of the 97th Congress.

I am also transmitting a copy of the outlined program to you for your individual use.

Sincerely,

STROM THURMOND,
Chairman.

(v)

COMMITTEE HISTORY

On the day after the Senate first convened in 1789, eight Senators were designated to develop a bill which eventually became the Judiciary Act of 1789, one of the principal legislative achievements of the First Congress. This measure and other laws enacted during the first several decades of the history of the Senate were referred to select committees appointed for specific purposes. As the workload of Congress grew, however, first the House and then the Senate began to develop standing committees. The first standing legislative committees of the Senate were created in 1816 and included a Committee on the Judiciary complementing the House Committee established 3 years earlier.

The initial responsibility of the Senate Committee on the Judiciary involved scrutiny of measures concerning the courts, law enforcement, and judicial administration. These matters remain at the core of the jurisdiction of the Committee, but many other important responsibilities have been added. Early additions were bankruptcy policy and State boundaries. The Legislative Reorganization Act of 1946 added several subjects theretofore assigned to other Senate committees. The question of apportioning Representatives, for example, had been considered by the Committee as early as the 17th Congress, but was later transferred to the Committee on Commerce until 1946, when it was returned to the Committee. Jurisdiction over patents, trademarks, and copyright policy initially resided with the Committee, until the Senate created its Committee on Patents in 1837. Likewise, immigration and naturalization measures were considered by the Committee until 1889, when the Committee on Immigration was established. In 1946, these and other subjects were restored to the jurisdiction of the Committee as part of a committee consolidation substantially reducing the number of standing Senate committees.

The jurisdiction of the Committee on the Judiciary over proposed constitutional amendments has grown less erratically. The Committee considered only two proposed amendments before the War Between the States but considered two out of every three such proposals during the 25 years following. All but 3 percent of the amendments introduced in the Senate between 1923 and 1946 were referred to the Committee, and its jurisdiction became exclusive thereafter.

The responsibility of the Committee for considering judicial and certain executive branch nominations developed similarly. In 1868, the Senate determined that all nominations should be referred to appropriate standing committees. Prior to that time, nominations were referred by motion only, and no more than perhaps one out of three Supreme Court nominations were sent to the Committee for initial consideration. Since Reconstruction following the War Between the

States, however, the role of the Committee in confirmation proceedings became increasingly commonplace.

Inevitably, given its important and growing responsibilities, the Committee began to bear a significant share of the workload of the Senate. Following World War I, as much as 10 percent of Senate business was referred to the Committee on the Judiciary. Following 1946, when components of its jurisdiction were added or restored, the Committee became responsible for 25 to 40 percent or more of all measures in the Senate. As a result, the Committee has grown in size commensurate with increased responsibility.

JURISDICTION

Under Senate practice and Rule XXV of the Standing Rules of the Senate, the present jurisdiction of the Committee on the Judiciary includes the following:

1. Apportionment of Representatives.
2. Bankruptcy, mutiny, espionage, and counterfeiting.
3. Civil liberties.
4. Constitutional amendments.
5. Federal courts and judges.
6. Government information.
7. Federal charters, holidays, and celebrations.
8. Immigration and naturalization.
9. Interstate compacts generally.
10. Judicial proceedings, civil and criminal, generally.
11. Local courts in the territories and possessions.
12. Measures relating to claims against the United States.
13. National penitentiaries.
14. Patent Office.
15. Patents, copyrights, and trademarks.
16. Protection of trade and commerce against unlawful restraints and monopolies.
17. Revision and codification of the statutes of the United States.
18. State and territorial boundary lines.

COMMITTEE REORGANIZATION

During the 96th Congress, the Committee on the Judiciary was organized with seven subcommittees. These were: Administrative Practice and Procedure; Antitrust, Monopoly, and Business Rights; The Constitution; Criminal Justice; Improvements in Judicial Machinery; Jurisprudence and Governmental Relations; and Limitations of Contracted and Delegated Authority.

At the beginning of the 97th Congress, Chairman Thurmond recommended and the Committee approved a functional reorganization of the Subcommittees. In lieu of seven subcommittees, the Committee now has nine. Each new Subcommittee is responsible for clearly delineated jurisdiction and for day-to-day management of designated segments of the workload of the Committee.

The new Subcommittee organization is as follows:

CRIMINAL LAW

Mr. Mathias, Chairman

Mr. Laxalt
Mr. Specter
Mr. Dole

Mr. Biden
Mr. Metzenbaum
Mr. Heflin

REGULATORY REFORM

Mr. Laxalt, Chairman

Mr. Dole
Mr. Mathias
Mr. Simpson

Mr. Leahy
Mr. Robert C. Byrd

THE CONSTITUTION

Mr. Hatch, Chairman

Mr. Thurmond
Mr. Grassley

Mr. DeConcini
Mr. Leahy

COURTS

Mr. Dole, Chairman

Mr. Thurmond
Mr. Simpson
Mr. East

Mr. Heflin
Mr. Baucus

IMMIGRATION AND REFUGEE POLICY

Mr. Simpson, Chairman

Mr. Thurmond
Mr. Grassley

Mr. Kennedy
Mr. DeConcini

SEPARATION OF POWERS

Mr. East, Chairman

Mr. Hatch
Mr. Denton

Mr. Baucus
Mr. Heflin

AGENCY ADMINISTRATION

Mr. Grassley, Chairman

Mr. Laxalt
Mr. Specter

Mr. Metzenbaum
Mr. Baucus

SECURITY AND TERRORISM

Mr. Denton, Chairman

Mr. Hatch
Mr. East

Mr. Biden
Mr. Leahy

JUVENILE JUSTICE

Mr. Specter, Chairman

Mr. Denton
Mr. Mathias

Mr. Metzenbaum
Mr. Kennedy

Chairman Thurmond is a member *ex officio* of all Subcommittees of which he is not a regular voting member.

COMMITTEE BUDGET AND STAFF

The budget of the Committee on the Judiciary for legislative fiscal year 1980 was \$5,727,629.¹

For fiscal year 1981 (March 1, 1981 through February 28, 1982) the Chairman recommended and the Committee approved a budget reduction of \$1,431,097 or a cut of 25 percent from the level of funding for the previous fiscal year. The proposed Committee budget was further reduced by \$23,000 in the Committee on Rules and Administration, and the entire budget thereafter was approved by the Senate for a total taxpayer savings of \$1,454,097. That savings represented the largest single budget reduction of any Committee of the Senate in the new Congress.

Moreover, also on the recommendation of the Chairman, the Committee on the Judiciary agreed to reduce its budgeted staff from 192 to 134. The Committee felt that staff size had reached unwieldy proportions.

For the new legislative fiscal year, the Committee has proposed a budget which essentially holds the line at the reduced level approved last year. Budgeted regular staff remains at the reduced level of only 134 positions. The budget request for the new fiscal year totals \$4,748,223 which represents a slight increase over the budget for last year and reflects fact-of-life salary increases and the projected cost of certain investigations of the Office of Public Integrity at the Department of Justice.

NOMINATIONS

Article II, section 2 of the Constitution gives the President the power to appoint the principal officers of the Federal Government "by and with the Advice and Consent of the Senate." The Committee on the Judiciary has a unique role in reviewing nominations. It considers the choice not only of Federal administrators in the executive branch but also of judges and judicial officers—the principal decisionmakers of an entire separate branch of the Federal Government. During the Second Session, the process of appointment of Judges to the Federal bench will be a major responsibility of the Committee.

JUDICIAL NOMINATIONS

The Omnibus Judgeship Act, passed in the Second Session of the 95th Congress, created 152 new judgeship positions: 117 positions for Federal District Courts and 35 positions for the 11 Federal Circuit Courts. Many of these new positions are still unfilled and at the beginning of the 97th Congress 34 positions at the District Court level and 8 at the Circuit Court level were vacant.

During the First Session, the Committee favorably reported, and the Senate approved, 1 Justice of the Supreme Court, 8 judges of Federal Circuit courts, and 33 judges of Federal District Courts. During the Second Session, because of normal retirements, the Committee anticipates the need to process as many as 30 to 40 additional nominations for positions in the Federal Judiciary.

¹ This figure does not include \$197,000 voted for the Billy Carter Investigation by S. Res. 513 approved on August 27, 1980.

In order to ensure that only the highest qualified nominees are confirmed for positions on the Federal bench, the Committee during the Second Session will continue carefully to evaluate the qualifications of the men and women whose names are submitted to it.

An extensive questionnaire has been developed in order to provide the maximum information to the Committee about each candidate. The questionnaire, which is to be filled out by each nominee, covers matters of background, training, experience, writings, attitudes concerning equal justice under law and limitations on judicial power, finances, and possible conflicts of interest.

Investigative staff responsible for a careful study and analysis of the background and qualifications of nominees has been assembled, and the Chairman has arranged to obtain access to FBI reports and other investigative materials of the Department of Justice.

The Chairman has established general nomination procedures to be followed in processing each nomination.

Upon receipt of a nomination from the President, the Committee will give public notice, issue blue slips to the Senators from the nominee's State requesting their comments, and send its questionnaire to the nominee. The Committee will also solicit comments about each nominee from interested organizations and individuals.

NONJUDICIAL NOMINATIONS

The Committee on the Judiciary will also act upon the nominations of top administrators and policymakers in the executive branch of the Government. Nominations for positions in the following agencies and posts are processed in the Committee: Department of Justice, Administrative Conference of the United States; all U.S. attorneys and U.S. marshals; the judge, attorney and marshal for the Canal Zone; Civil Rights Commission; Community Relations Service; Court of Claims; Court of Customs and Patent Appeals; U.S. Customs Court; Drug Enforcement Administration; Federal Bureau of Investigation; Foreign Claims Settlement Commission; the judge, attorney and marshal for Guam; Immigration and Naturalization Service; Parole Commission; and Patent Office.

During the First Session, the Committee approved, and the Senate confirmed 123 nominations in the executive branch, of which 65 were U.S. attorneys and 37 were U.S. marshals.

SUMMARY

The confirmation process, during the Second Session, will impose a substantial burden on the Committee and on its resources. More than 150 nominations could come before the Committee on the Judiciary during the Second Session of the 97th Congress.

DEPARTMENT OF JUSTICE AUTHORIZATION AND OVERSIGHT

The American people since the time of the American Revolution have shown an overriding interest in the effectiveness and fairness of criminal and civil justice. That interest continues unabated today and

has intensified in recent years as a result of growing public awareness of past failures in the Department of Justice in the impartial administration of justice.

There are increasing demands for efficiency in Government and for a reduction in the cost of Government. These goals render the need for thorough oversight all the more essential.

The Committee on the Judiciary will conduct extensive oversight hearings in connection with the budget of the Department of Justice and the programs of the Department in relation to results achieved.

As an important element of the foregoing process, the Committee will consider and report a bill authorizing expenditures for the Department of Justice for fiscal year 1983 and may report legislation now under consideration in the Subcommittee on Courts to require similar annual authorization for the Federal Judiciary.

ANTITRUST

The Committee on the Judiciary at its organizational meeting on January 27, 1981, decided that the protection of trade and commerce against unlawful restraints and monopolies included matters of such great public significance that the entire Committee should be directly involved.

Effective antitrust enforcement is perhaps more important today than at any other time in the history of our country. The cost of inflation, the predatory tactics of foreign cartels, the limitations of our resources, the high rate of unemployment, and other serious problems of economic dislocation, all combine to demand full attention in the Committee on the Judiciary to policy affecting competition and freedom in the marketplace.

Vigorous antitrust enforcement, conducted with full recognition that Government regulation or interference can itself be anticompetitive, will thus continue to be an important objective of the Committee during the Second Session of the 97th Congress.

The promotion of competition in the marketplace is a key to protecting the real income of citizens and is a cornerstone of individual political freedom since no citizen's freedom can be full if it is circumscribed by overriding economic powers.

In pursuing these objectives, primacy will be given to efficiency in the enforcement of existing statutes designed to guard against monopoly power.

As the Supreme Court stated in *Northern Pacific Railway v. U.S.*, 356 U.S. 1, 4-5 (1958):

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

But notwithstanding the general overall effectiveness of the Federal antitrust laws, few would assert that the statutes involved are immune

to beneficial change. To that end, the Committee will seek to ascertain where the antitrust laws have proven ineffective and will recommend legislative correction if an underlying statutory defect is proven to be the cause. On the other hand, where inefficiency in statutory enforcement is at the heart of a demonstrated problem, the Committee will seek to influence the actions of the executive branch to achieve more certainty and vigor in the application of existing law.

A major concern of the Committee on the Judiciary will be sustaining competition in the refining and gasoline marketing industry.

During the last Congress, the Committee considered S. 2828, the "Small Business Motor Fuel Marketers Preservation Act." A similar proposal, S. 326, came before the Committee during the First Session of the 97th Congress and was favorably reported to the Senate on December 15, 1981.

Because of the fundamental importance of the petroleum industry and of the distribution of its products in all segments of the American economy, the Committee expects also to devote detailed study to the problems perceived in major oil company mergers and in the antitrust exemptions of the Energy Policy and Conservation Act.

The Committee has reported legislation, S. 816, to correct the anomalous holding in *Pfizer v. India* in which the Supreme Court recognized the right of a foreign government to recover treble damages against a United States citizen for antitrust violations even though the United States Government is limited to single damages and even though a complaining foreign government may not itself recognize even the most fundamental concepts of competition and free market policy. S. 816 passed the Senate on July 9, 1981, and is now before the House of Representatives.

In a related area, the Committee will study the anticompetitive effects of the activities of foreign governments and of foreign government-supported cartels on the American economy. In connection with that study, the Committee will seek legislative remedies for the problem of foreign use of the American antitrust laws when advantageous and the concurrent use of foreign monopoly power when that advantage supports the political or economic objectives of the foreign government or its government-supported industries.

The Committee is also considering proposals (chiefly, S. 995) to require contribution in the recovery of trebled damages in antitrust litigation. The Committee is cognizant of the argument that undue pressure can be brought to bear on one single defendant through the threat of execution of a total judgment against that targeted defendant even though many defendants may have contributed to the underlying offense. The Committee will continue to examine methods for reducing the potential for abuse in selective recovery of trebled damages.

PATENTS, COPYRIGHTS, AND TRADEMARKS

Closely tied with protection against unlawful restraints of trade and monopoly is the law of patents, copyrights, trademarks, and trade secrets. With antitrust law, these subjects will also be retained for direct review by the full Committee.

During the last Congress, the Committee on the Judiciary considered and Congress approved two patent reform bills. These were S. 414, the

University and Small Business Patents Act, and S. 1679, the Patent and Trademark Act Amendments of 1980, both of which became law as H.R. 6933. Because the legislation is new, the Committee is giving particular emphasis to oversight of the new statute and all regulations that may be issued under it during this Congress.

The Committee has also given special attention to a legislative proposal, S. 255, to restore the full life of a patent to the 17-year term intended by present law. At this time, the effective life of many patents is greatly reduced by the time taken by the Government in determining the safety and suitability of the patented product. The Committee favorably reported S. 255 on June 10, 1981. The Senate passed the bill on July 9, 1981, and it is now before the House of Representatives.

The Committee is also reviewing proposals for reductions in the administrative requirements placed on small and independent inventors and companies who seek patent or trademark protection.

In copyright law, the Committee has focused on the effectiveness of the Copyright Act of 1976 in relation to secondary transmissions by cable communications systems. In that connection, the function and operations of the Copyright Tribunal will continue to be subject to Committee oversight.

A new problem which arose during the First Session will also require Committee attention. On October 19, 1981, the U.S. Court of Appeals for the Ninth Circuit held that video tapes produced in the home from public broadcasts were nonetheless subject to copyright royalty payments. In response to that decision, the Committee is now considering S. 1758, a measure which would permit such home reproduction. Hearings on that bill and related proposals are planned for this session.

THE CONSTITUTION

In a broad sense the greatest responsibility of the Committee on the Judiciary is its responsibility for measures or matters bearing on the Constitution itself. As fundamental law, proposals for change in the Constitution (or for its novel interpretation) cannot be treated other than with great deliberation and careful review.

A change in the basic structure of the Federal system should be undertaken only after overwhelming demonstration of the need for change. The Committee will therefore approach proposals for changes in the Constitution with circumspection and from a perspective that requires a high degree of proof of need.

The Committee, through its Subcommittee on the Constitution, heard extensive testimony in support of an amendment to the Constitution requiring a balanced Federal budget, and the Committee during the First Session of this Congress approved S.J. Res. 58, an amendment of that nature, which was proposed by Chairman Thurmond. S.J. Res. 58 has been on the Senate Calendar since July 1981, and is a very high priority measure for the Committee and the country.²

Other issues which may suggest a need for change in public policy, for example, right to life, prayer in schools, and forced busing, may be more properly addressed by statute; however, the Committee may act on a right-to-life constitutional amendment early in the new session.

²Thirty-two States have already petitioned for a constitutional convention on the balanced budget issue, and the Subcommittee has favorably reported to the full Committee S. 817, the Constitutional Convention Implementation Act.

The Subcommittee on the Constitution, in addition to proposals for amending the Constitution, will also continue to consider the general issue of preferential treatment based on quotas involving race, color, sex, nationality, or ethnic origin. In that connection, the Subcommittee has reported legislation to reauthorize the United States Civil Rights Commission with a provision requiring the study of reverse discrimination.

The Subcommittee on the Constitution also will continue its review of the effect of recent Supreme Court decisions which expand municipal liability under section 1983 of the Civil Rights Act. The original intent of that section of the Civil Rights Act juxtaposed to its present application will remain the focus for that review. Related measures, S. 584 and S. 585, may well be reported to the Senate or incorporated by amendment in other legislation before the close of the Second Session.

Because of its direct bearing on civil liberties, the Subcommittee will also continue to monitor the implementation of the Freedom of Information Act in order to determine what difficulties have arisen under the Act and what remedial legislation should be recommended to the Senate for improvement in the application of the statute in the various agencies of the executive branch.

As a matter also affecting civil liberties, the Subcommittee has reviewed proposals for bail reform (chiefly, S. 1554) designated to allow courts to consider danger to the public as a factor in setting reasonable bail. S. 1554 was ordered favorably reported to the Senate on December 8, 1981.

Finally, the Subcommittee will consider proposals to amend the Voting Rights Act, a permanent statute which does not expire but to which changes have been advocated.

CRIMINAL LAW

The Committee will intensify its ongoing review of Federal criminal law toward the goal of obtaining a complete revision and codification of the body of criminal law that has evolved since the First Congress. In that regard, on January 25, 1982, the Committee reported to the Senate S. 1630, the Criminal Code Act.

The American people continue to be disappointed in the effectiveness of law enforcement agencies at all levels of government and in the efforts of those agencies to reduce violent crime. Moreover, the pervasive influence of organized crime has grown to massive proportions and is so intertwined with the economic life of the country as virtually to defy elimination.

Although criminal law enforcement in the Federal system is primarily a responsibility of State and local government, the Federal Government should play a key role in setting standards as an example for the States and in fighting criminal combination which is interstate in character.

In addition to the continued criminal code project, the Committee, through its Subcommittee on Criminal Law, will examine a variety of criminal law reform proposals.

For example, sentencing reform to provide for greater uniformity and fairness in the punishment of Federal offenders will be a primary issue before the Committee. Particularly important in Committee deliberation have been proposals for the constitutional imposition of

the death penalty and for a determinate sentencing system. On July 1, 1981, the Committee reported S. 114, the Federal Death Penalty Act, but the bill has remained on the Senate Calendar without action.

Federal statutes, specifically directed against organized crime will be examined to determine if the effectiveness has been reduced by unnecessary procedural requirements that impede prosecutors without, in fact, enhancing procedural due process.

The Committee will also be particularly interested in the functioning of the Criminal Division of the Department of Justice, and its Subcommittee on Criminal Law will continue to oversee the work of the Criminal Division, the Bureau of Prisons, and the United States Parole Commission.

During the course of a criminal prosecution, frequently a court must decide whether evidence, which the Government intends to introduce at trial, was seized in conformity with fourth amendment requirements. If the court determines that these requirements were not satisfied, the evidence is excluded from trial and may result in the dismissal of the criminal prosecution.

Some observers have expressed dissatisfaction with the procedure since the evidence is excluded regardless of how insignificant the fourth amendment violation or how important the evidence. Critics have suggested that the exclusionary remedy is sometimes disproportionate to the invasion. Moreover, the exclusionary remedy is not mandated by the Constitution. The Committee has evaluated this court-made rule to determine whether a different, yet effective remedy for fourth amendment violations can be fashioned. In that connection, the Subcommittee on Criminal Law has held hearings on S. 101 and S. 751, both of which would modify the present exclusionary rule. Legislation on this subject may be reported to the Senate during the Second Session.

REGULATORY REFORM

America has experienced a virtual explosion in Federal regulation during the past decade. In those 10 years, seven new regulatory agencies were created, and regulation itself expanded geometrically.

The impact of Federal regulation on the operation of government has been unmistakable: between 1970 and 1979, expenditures in the major regulatory agencies increased by over 400 percent. Even the number of pages published annually in the *Federal Register* increased by nearly 300 percent.

This regulatory avalanche fell hardest on working people and small businessmen. The economic and social costs were higher prices, less employment, and lower productivity. The hidden expense of Federal regulation—costs passed on to citizens—could be greater than \$100 billion per year. Worse still, by creating uncertainty and increased risk in the marketplace, Federal regulation has caused entrepreneurs to defer or terminate plans for capital investment.

The negative economic impact of Federal regulation may be warranted if the benefits of regulation outweigh their cost. Regulatory gains, even those with negative impact on gross national product, in some circumstances, for example, improved public health or safety, are undeniably worth the goods and services foregone. Thus, regulatory reform is not merely a program to reduce runaway costs; it is an

effort to focus scarce resources more effectively by eliminating non-beneficial regulation.

Over 100 bills were introduced in the last Congress dealing with regulatory reform. These proposals included a general congressional veto over regulations, requirements for cost-benefit analysis of new rules, and termination of agencies whose programs were felt to be no longer justified. Two omnibus bills, linking many of the more specific reform proposals, were considered in detail by the Committee on the Judiciary.

In the 97th Congress, regulatory reform is being considered by the Committee as a component part of a general legislative package designed to increase American productivity.

The Committee has conducted extensive hearings in its new Subcommittee on Regulatory Reform which has studied several major proposals.

Modification of the basic charter of administrative lawmaking and enforcement, the Administrative Procedure Act, has been a focus of activity. Initially, therefore, the Subcommittee on Regulatory Reform examined legislation (S. 1080, the Regulatory Reform Act) modifying the procedures and standards by which agencies promulgate regulations. Statutory revision to require agencies to address the range of trade-offs inherent in regulatory decisions have received highest priority. Similarly, legislation establishing periodic review of regulations will be considered at an early date. Problems in agency adjudication and in the role of administrative law judges will also be given substantial attention.

The Regulatory Reform Act, S. 1080, will probably pass the Senate in March 1982, and the bill could become public law early in the Second Session.

It is the function of Congress to make Federal law and to set Federal policy. Judge David Bazelon of the District of Columbia Circuit Court of Appeals in a recent article decried the failure of the legislative branch to retain full control of lawmaking:

Traditionally, in democratic societies, it is elected legislatures that make the hard value choices . . . increasingly, however, our legislatures have been delegating their value choices to administrative agencies—institutions which cannot resolve value conflicts through the relatively simple expedient of a show of hands.

Sharing Judge Bazelon's insight, the Committee and the Subcommittee on Regulatory Reform will advance legislation shaping regulatory decisionmaking to the general values that the American people, speaking through Congress, desire. Abuse of power by unelected bureaucrats, for example, the *ultra vires* activities of the Internal Revenue Service in connection with the tax exempt status of private schools, will remain a major concern of the Subcommittee and Committee.

COURTS

The Federal courts have been increasingly a subject of public criticism. Simple cases can take several years to resolve. Antiquated procedures result in inefficient operations complicated by a massive upsurge in litigation.

During the Second Session of this Congress, the Committee and its Subcommittee on Courts will consider legislation intended to alleviate the barriers that hinder speedy and equitable resolution of cases in Federal courts.

FEDERAL DIVERSITY JURISDICTION

For several years the Committee has considered proposals to limit or abolish "diversity" jurisdiction of the Federal courts. "Diversity" jurisdiction involves claims arising under State law which can be litigated in Federal courts if the parties to the case are residents of different States. Separate State sovereignty within the Federal system is the foundation for diversity jurisdiction. In view of significantly increasing caseloads in the Federal Judiciary, the Subcommittee on Courts will continue to oversee the current practice of Federal courts in considering diversity litigation. In so doing, the Subcommittee will remain aware of the substantial risk of prejudice to out-of-State defendants sued in the local court of the jurisdiction in which a plaintiff resides.

ADMINISTRATIVE LAW TRIBUNALS

In the 96th Congress, the Senate considered, but did not enact, "fair housing" legislation. The measure that came before the Senate provided that housing discrimination disputes arising under the legislation would be considered by administrative law judges in the same department of government that would bear primary responsibility for administration and enforcement of the proposed statute.

Although important in the context of nondiscriminatory housing, the "fair housing" proposal raised much broader constitutional questions concerning jury trial, proof of intent, and the proper role of administrative law judges and of Federal magistrates or other representatives of the Federal judicial system.

The Subcommittee will continue its interest in the role of non-judicial tribunals and will examine means for expedited, impartial, and yet constitutionally permitted procedures for handling the growing volume of adversary proceedings which are in substance equivalent to traditional litigation.

SUPREME COURT JURISDICTION

Legislation affecting the jurisdiction of the Supreme Court will provide a basis for Committee consideration of proposals designed to remove certain elements of the obligatory, appeal by right, jurisdiction of the Supreme Court. Specifically, the Subcommittee on Courts will examine a proposal to permit the Court exclusive control of its own docket by grant or denial of writ of certiorari. In that connection, the Subcommittee will remain cognizant of the provisions of Article III, Section 2, of the Constitution which gives Congress plenary power to delineate and regulate the appellate jurisdiction of the Supreme court and which does not give that power to the Supreme Court itself.

EQUAL ACCESS TO JUSTICE

In the 96th Congress, the Committee held hearings on the "Equal Access to Justice Act," a bill which would entitle prevailing parties

to recover an award of attorney fees, expert witness fees, and other costs against the United States in those cases in which Government action was not substantially justified. The Committee, through its Subcommittee on Courts, will continue its interest in the award of fees and costs to private parties engaged in litigation with the United States.

FEDERAL COURT STRUCTURAL IMPROVEMENT

During the last Congress, the Committee worked on a proposal that would establish a new Court of Appeals for the Federal Circuit which would exercise the non-tax appellate jurisdiction presently held by the Court of Claims and the Court of Customs and Patent Appeals. The Court of Claims would be restructured into a Claims Court akin to a district court, handling claims cases, except for tax matters. This proposal has again been a subject for Committee consideration and was embodied in S. 1700 which passed the Senate on December 8, 1981.

TECHNICAL AMENDMENTS TO THE BANKRUPTCY REFORM ACT

The Subcommittee on Courts has devoted a substantial portion of time and resources to the consideration of some 300 technical amendments to the Bankruptcy Act of 1978. During the 96th Congress, the Senate passed similar legislation, but the bill failed to be enacted into law before the end of the Congress. The Committee held hearings on similar proposals during the First Session of the new Congress, and that legislation, S. 863, is now pending in the House of Representatives and will be monitored by the Subcommittee on Courts.

The Subcommittee will also continue its ongoing review of the Federal Bankruptcy Amendments of 1978. A major effort to reform that statute is anticipated during the Second Session for the purpose of correcting statutory defects which have become apparent in experience over the past few years.

OMNIBUS JUDGESHIP ACT

The volume of cases being filed in both Federal district courts and the circuit courts of appeal has steadily increased. In 1970, the Judicial Conference proposed that a study be performed every 4 years to determine the number of judges required to handle existing and projected caseloads effectively. The Judicial Conference has suggested that whenever the filing rate in district courts becomes greater than 400 cases per judge, the caseload may be excessive and indicative of a need for an additional judge. The Judicial Conference performed a quadrennial survey in 1976, and in response to its recommendations the 95th Congress enacted the "Omnibus Judgeship Act of 1978" which created 117 new district court judgeships and 35 new circuit court judgeships.

The Judicial Conference is completing another quadrennial survey and is expected to recommend another increase in the number of district and circuit judgeships. Chief Justice Burger, in his yearend Report on the Judiciary, also recommended that the number of Federal judgeships be increased. The Committee or the Subcommittee on Courts may consider recommendations to increase the number of judgeships and will analyze the findings of the Judicial Conference.

NATIONAL COURT OF APPEALS

The United States Supreme Court is currently the only court which can create consistent, uniform Federal law by handing down judgments which have the effect of binding precedent on all State and Federal courts.

In 1975, the Commission on Revision of the Federal Court Appellate System found that the Supreme Court was overburdened by a significant increase in its caseload. The Commission found that the inability of the Supreme Court to handle the increased Federal caseload had resulted in an increase in the number of conflicting opinions between and among Federal circuit courts. The Commission also found that the Supreme Court was unable to grant plenary review in all cases where such review was warranted because valuable court time was spent hearing cases that merited Supreme Court review only because of an intercircuit conflict.

The Subcommittee on Courts will continue to study the arguments for and against a National Court of Appeals to adjudicate issues of Federal law and to resolve intercircuit conflict and will also study the effect of court-made law in generating increased caseloads.

IMMIGRATION AND REFUGEE POLICY

Immigration and refugee policy are a high priority in the demand of the American people for fundamental reform in Federal law enforcement.

Immigration and naturalization statutes have become excessively complex and are often enforced erratically and with a very low degree of certainty.

In a general sense, the Committee on the Judiciary through its Subcommittee on Immigration and Refugee Policy is conducting a complete review of the immigration and naturalization statutes and of Federal refugee policy. The goal will be to simplify the law and to achieve certainty in its enforcement.

In that effort, the Committee is relying heavily on the completed work of the Select Commission on Immigration and Refugee Policy.

The Select Commission was composed of four members of the Senate Committee on the Judiciary, four members of the House Committee on the Judiciary, four Cabinet officers—the Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of Health, Education, and Welfare—and four members who were appointed by the President, including the chairman. The Select Commission was directed “to study and evaluate . . . existing laws, policies, and procedures governing the admission of immigrants and refugees to the United States and to make such administrative and legislative recommendations to the President and to the Congress as are appropriate.”

Specifically, the enabling statute instructed the Commission to: “(1) conduct a study and analysis of the effect of the provisions of the Immigration and Nationality Act (and administrative interpretations thereof) on (a) social, economic, and political conditions in the United States, (b) demographic trends, (c) present and projected unemploy-

ment in the United States, and (d) the conduct of foreign policy; (2) conduct a study and analysis of whether and to what extent the Immigration and Nationality Act should apply to the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, and the other territories and possessions of the United States; (3) review, and make recommendations with respect to, the numerical limitations (and exemptions therefrom) of the Immigration and Nationality Act on the admission of permanent resident aliens; (4) assess the social, economic, political, and demographic impact of previous refugee programs and review the criteria for, and numerical limitations on, the admission of refugees to the United States; (5) conduct a comprehensive review of the provisions of the Immigration and Nationality Act and make legislative recommendations to simplify and clarify such provisions. . . ."

Four Senators who are present members of the Committee on the Judiciary served on the Select Commission. Their work on the Commission has been of significant aid to the Committee.

Among the topics considered by the Commission and under consideration in the Subcommittee on Immigration and Refugee Policy are the following:

- Enforcement of existing law at the borders of our country and within the country, including all budget considerations commensurate with increased enforcement activity.
 - Sanctions against employers who hire illegal aliens and enforcement procedures which will not prove intrusive upon the individual or detrimental to civil liberties.
 - The cost of the Cuban/Haitian mass influx and a review of possible methods to prevent or alleviate such occurrences in the future with particular emphasis on refugee flow from Central America if Communist repression and terrorism continues to increase in that region.
 - The Refugee Act of 1980 with special emphasis upon the correctness of the present definition of "refugee."
 - Bilingual education and its effect on assimilation; methods of improving the pace and the extent of assimilation.
 - The immigration and internal identification policies and procedures of other developed, free-world countries.
 - Deportation and exclusion standards and procedures for immigrants and nonimmigrants.
 - The effect of immigration upon population size and ethnic balance.
 - The effects of the "per-country limit" policy.
 - Temporary worker proposals, H-2 programs, and related treaty obligations.
 - The constitutional basis, if any, for granting United States citizenship to children born in the United States to illegal alien parents.
 - Bureau of Census policy toward illegal aliens and the impact of that policy on representation in the Congress.
 - The effect of illegal immigration upon crime and domestic unrest.
 - The impact of giving "amnesty" or "legalization" to illegal aliens who have resided in the United States for a stated period of time.
- A review of the foregoing subjects has formed a background for consideration of immigration reform legislation.

The objective of the Committee and its Subcommittee on Immigration and Refugee Policy will be to bring a degree of reasonableness and commonsense into Federal refugee policy and immigration and naturalization statutes. In so doing, the Committee will not be reluctant to replace unrealistic proposals and statutes that are best characterized as being fashioned out of a fabric of political expediency and unattainable ideals. A major reform proposal is likely to be reported by the Committee during the Second Session.

PRIVATE IMMIGRATION BILLS

Each year the Committee is required to consider and process a large number of private immigration bills and adjustment-of-status cases. Also brought before the Committee are a large number of cases referred by the Attorney General in which he has exercised his discretionary authority to waive certain provisions of the Immigration and Nationality Act or has utilized his special authority to parole into the United States or to grant conditional entry to certain refugees.

The Committee, through its Subcommittee on Immigration and Refugee Policy, is processing and considering several hundred individual private immigration bills together with a large number of similar matters referred by the Attorney General.

OVERSIGHT

A major responsibility of the Subcommittee on Immigration and Refugee Policy is oversight of the implementation of the Immigration and Nationality Act of 1952, as amended. Oversight responsibility for the Immigration and Naturalization Service has consumed—and will continue to involve—extensive time and attention of the Committee. In monitoring the implementation of United States immigration law and the complex administrative practices and procedures governing American policy in the immigration and naturalization field, in international migration and related humanitarian affairs, the Committee, through its Subcommittee on Immigration and Refugee Policy, is maintaining a very close working relationship, on a daily basis, with the Commissioner of the Immigration and Naturalization Service, with the Presidential Coordinator for Refugee Affairs (S/R) at the Department of State, with the Agency for International Development, and with a range of international organizations and private voluntary agencies.

In addition to general immigration oversight, the Committee, through its Subcommittee, will continue to give careful attention to the responsibility it has in international migration and refugee problems, a responsibility once embodied in its former Subcommittee on Refugees (a subcommittee established by Congress within the Committee in 1952). That jurisdiction involves oversight of programs costing hundreds of millions of dollars, ranging from oversight of the Indochinese refugee assistance program, the Laotian parole and assistance program, the Cuban prisoner release program, the Latin American parole program, and other worldwide refugee assistance programs, for example, those in Southern Africa, Cyprus, Pakistan,³

³ There are currently an estimated 1.6 million refugees in Pakistan who are victims of the Russian invasion and occupation of Afghanistan.

etc. These crucial assistance programs reflect the deep humanitarian spirit of Americans and will remain a priority matter before the Committee in the 97th Congress. In that connection, the Committee is working closely with the Committee on Foreign Relations and with the Presidential Coordinator for Refugee Affairs at the Department of State.

SEPARATION OF POWERS

The Committee at its business meeting on January 27, 1981, decided to reconstitute the former Subcommittee on Separation of Powers. The Committee felt that the fundamental issues involved in separation of power between the three branches of the Federal Government and the division of power between the Federal Government and the States justified a separate panel, both for the purpose of general oversight and for the due consideration of statutes intended to preserve the doctrine of Separation of Powers and to protect the division of power made specific in the tenth amendment to the Constitution.

In the Second Session of the 97th Congress, the Committee and the Subcommittee on Separation of Powers will focus attention on the constitutional limits imposed on the Federal judiciary and the extent to which the other two branches of the Federal Government have failed to preserve their own power when confronted with the exercise of judicial power.

Particularly, the Subcommittee on Separation of Powers is reviewing proposals for statutory limits on court-ordered enforcement mechanism and on the jurisdiction of the Federal courts, both as a general matter and in the context of individual substantive issues—especially the freedom to pray in schools, forced busing, right to life, and other examples of the overweening exercise of power by Federal judges.

As a matter fundamental to the jurisdiction of the Subcommittee under the doctrine of Separation of Powers, the Subcommittee will continue an interest in establishing procedures for a Constitutional Convention under Article V of the Constitution.

The Subcommittee will also renew its former interest in the application of the doctrine of Separation of Powers to issues involving treaty law and international agreements. Particularly, the Subcommittee will maintain oversight of the decisions of the executive branch in abrogating or establishing treaty law and in making or unmaking executive agreements which tend to have the practical effect of statute.

The Subcommittee also expects to initiate an ongoing review and investigation of the newly evolved theory that the Department of Justice on its own initiative can accomplish the *de facto* repeal of Federal statute by notifying Congress that a given statute will no longer be enforced. The Subcommittee may seek, through legislation, to reestablish the formerly unchallenged principle that the executive held responsibility for enforcing the law and that Congress alone could repeal law.

The proposed Judicial Tenure Act, providing for removal of Federal judges by other members of the judicial branch for conduct contrary to the "good behavior" clause of Article III of the Constitution, was passed in the Senate on September 7, 1978. A similar measure died in the House. New legislation offering means of disciplining Federal judges, for example, peremptory challenge legislation, may be

introduced in the 97th Congress. If so, those proposals will likely be considered in the Subcommittee on Separation of Powers.

The constitutional, legal, and ethical questions of separation of powers concerning the judicial branch and its involvement with pending or proposed legislation, especially matters involving pay, may again come before the Committee. If so, that matter too will be a subject for study in the Subcommittee.

AGENCY ADMINISTRATION

The Committee on the Judiciary established at the beginning of the 97th Congress a new Subcommittee on Agency Administration with jurisdiction over the legislative veto, congressional or judicial appeal of Federal agency determinations or procedures, consumer interest in Federal agency and executive branch actions, and claims against the United States.

Increasingly, Congress has passed laws which are little more than frail skeletons of policy. Substantive law is provided in large measure by administrative agencies that are creatures of Congress.

But agencies no longer draft regulations as mere guidelines for the enforcement of law; rather, they make substantive law themselves.

In the Second Session of the 97th Congress, the Subcommittee on Agency Administration will continue to examine the process by which Congress and the courts review the validity of agency exercise of delegated authority and will seek to develop alternatives to expedite review.

An increasingly popular tool created by Congress to maintain effective oversight of regulations developed by administrative agencies is the congressional veto.

The Library of Congress Congressional Research Service reports that, since 1932, 186 Acts of Congress have contained 264 separate provisions giving Congress direct review powers. Over half were enacted since 1970. In 1980 alone, over 30 congressional veto provisions were enacted.

The Subcommittee on Agency Administration will endeavor to develop a broad based legislative approach to this issue to allow Congress an efficient method of ensuring that the regulatory authority it grants to administrative agencies is properly exercised.

The Subcommittee will be cognizant of the controversy concerning the constitutionality of this form of legislative review but will also take account of the failure of the Supreme Court over the past 50 years to rule unconstitutional any of the aforementioned 264 legislative review provisions that are in present law, including the veto provisions pursuant to which the Federal Court Rules of Civil and Criminal Procedure were promulgated. Several cases on this subject may come before the Supreme Court during the Second Session of this Congress.

The judicial branch obviously also plays a key role in the determination of whether agency regulations exceed statutory authority. The Committee will consider legislative proposals to make this review more equitable by removing the Court-imposed legal presumption that all agency rulemaking has been properly exercised within statutory authority.

Additionally, the Subcommittee will investigate agency solicitation for, and funding of, "consumer representation" in agency proceedings.

The procedures under which government agencies determine private organizations to be representing the "public" or "consumer" interest will be reviewed. Legislation to abolish publically financed, private intervention in agency proceedings will be a subject of interest.

The Subcommittee will continue its oversight of statutes and proposals authorizing Federal courts to award attorneys fees to persons who bring suit for judicial review of agency action (including actions of the Internal Revenue Service).

The Subcommittee has jurisdiction over matters affecting the Federal Tort Claims Act as well as all claims against the United States in which legislative redress is sought.

Amendments to the Federal Tort Claims Act may be considered during the Second Session of this Congress, and the Subcommittee will also investigate the advisability of raising the present \$15,000 limitation on certain military claims.

During the Second Session of the 95th Congress, a report was prepared for the Committee concerning the Department of Justice policy of hiring private counsel to represent Federal employees in civil lawsuits alleging violations of constitutional rights. The report concluded that the practice was subject to the following criticisms: the practice was not supported by any statutory authority to retain private counsel who are independent of department control; independent private counsel may raise legal arguments which are contrary to the public interest; the practice may interfere with criminal investigations of the same conduct; and the practice is extremely expensive.

As an alternative to that policy, the Department proposed at that time the enactment of amendments to the Federal Tort Claims Act which would immunize Federal employees and provide an exclusive cause of action against the United States in cases in which the Attorney General certifies that the Government employee in question was acting within the scope of his "office or employment or under the color thereof."

During consideration of the measure, the primary objection to the proposal was to the grant of blanket immunity to Federal employees no matter how egregious their conduct. Many witnesses expressed the view that some method of accountability for individual actions should be maintained.

Following the hearings and extensive discussions with the Department of Justice, a substitute proposal was developed to provide for a more limited form of immunity as well as internal agency disciplinary mechanisms. The Committee did not take final action on the legislation and therefore related proposals are now before the Subcommittee on Agency Administration.

Additionally, the Subcommittee, together with the Subcommittee on Courts, will consider in detail a proposal, S. 1847, to require annual budget authorization of the Federal Judiciary.

At present, the Federal Judiciary, an entire coequal branch of the Federal Government, is not subject to annual authorization and the budget review by authorizing committees entailed in that process. Hearings on S. 1847 are scheduled early in the Second Session. That bill, together with related proposals for alternating biennial authorization of the Department of Justice and the Federal Judiciary, are likely to receive early Committee attention.

SECURITY AND TERRORISM

The Subcommittee on Security and Terrorism was created by the Committee to investigate the alarming increase of incidents of terrorism within the United States and abroad, with particular attention to efforts of certain foreign powers to incite and support terrorist activities directed against United States citizens and property.

In addition, the Subcommittee is charged with responsibility to investigate those activities of foreign governments and entities which weaken our national security and affect the national defense.

The Subcommittee will continue to investigate other threats to our security including those stemming from deliberate efforts to disseminate false and misleading information amounting to disinformation by foreign intelligence services.

The Subcommittee during the Second Session will initially hold hearings consistent with its budgetary and oversight responsibilities with respect to the overall budgets of the Federal Bureau of Investigation, the Drug Enforcement Administration, and the United States Marshal Service. These hearings will in part review the major responsibilities of these agencies with full consideration to those programs touching on national security and domestic terrorism. Upon completion of these hearings, the Subcommittee will turn its attention to Soviet direction and control of SWAPO, the ANC, and the Cuban DGI. Additionally, it will examine the alarming increase in transfers of "state of the art" and other sophisticated technology to Mainland China, the Soviet Union, and the several countries of the Communist bloc. An investigation of this problem will require a complete analysis of the function of the primary agencies involved, including the Department of Commerce, the Department of State, the U.S. Customs Service, and the Federal Bureau of Investigation. The Subcommittee will examine trends in the export to Mainland China, the Soviet Union and bloc countries of other strategic materials including manufactured goods. This review will include a study of export and banking policy toward Communist bloc and third-world countries which support international terrorism.

The Subcommittee will continue to investigate and analyze certain organizations which, within the United States, have engaged in acts of terrorism, including acts of sabotage, aircraft hijacking, assaults and homicide. This investigation will probe the growth of various hate groups with specific attention to foreign direction, the acquisition of firearms and explosives, and the training of members in techniques of guerrilla warfare.

The Subcommittee will, as a part of its continuing responsibility, probe the use of illicit narcotics revenues to finance terrorist activities within the United States and will particularly examine the use of those revenues by the Cuban DGI.

In addition, the Subcommittee will continue its oversight of the activities of those entities of the Criminal Division of the Department of Justice which supervise enforcement of the Neutrality Act, the Foreign Agents Registration Act, and Federal laws relating to espionage, sabotage, munitions control and terrorism.

Two areas of particular legislative interest to the Subcommittee are the Export Administration Act of 1979 and the Foreign Agents Regis-

tration Act of 1938, as amended. It is anticipated that hearings involving those two statutes will focus in major part on enforcement mechanisms with respect to the latter statute and on multinational corporations, attorney-client privilege, civil investigative demands, civil penalties, and the commercial data exemption with respect to the former.

During the First Session, the Subcommittee reported favorably S. 391, the Agents Identities Protection Act. The Subcommittee will continue its direct interest in that legislation until it becomes public law. Thereafter, the Subcommittee will oversee the implementation of the new statute.

Presently under consideration in the Subcommittee is a proposal (S. 1959) to limit the congressional access of intelligence agents of Communist bloc countries. That proposal will be the subject of hearings and action in the Subcommittee early in the Second Session, as will be a related proposal (S. 1963) to amend the Foreign Agents Registration Act.

JUVENILE JUSTICE

Because of the marked increase in violent crime committed by juveniles, the Committee determined that the problem of juvenile crime was of sufficient magnitude to warrant the re-creation of the former Subcommittee on Juvenile Justice.

The Committee, through its Subcommittee, plans to determine whether the existing Federal juvenile justice statutes adequately respond to the current epidemic of criminal activity involving young people.

Of primary concern will be legislation to strengthen the deterrent effect of criminal statutes as applied to juveniles.

The Committee and Subcommittee will concentrate on proposals for juvenile sentencing reform for the purpose of reestablishing certainty of punishment for violent crime.

Additionally, the Subcommittee will exercise direct oversight of certain programs of Federal assistance to State juvenile justice programs and will examine conditions and proposals for improvement in Federal correctional facilities housing juveniles.

PUBLIC INTEGRITY INVESTIGATION

On November 6, 1981, the Senate approved S. Res. 222 which authorized funding for a special investigation of allegations concerning certain cases handled by the Office of Public Integrity at the Department of Justice.

The Committee is assembling a special investigative staff which will total seven individuals who will assist the Committee in carrying forward work done on the investigation during the 96th Congress and during the First Session of the 97th Congress. During the Second Session, the Committee expects to complete the investigation and has set a target date of October 1, 1982.

Initially, the investigation during the Second Session will focus on allegations concerning alleged improper activities of Robert T. Vesco and certain officials of the Carter administration.

SUMMARY

The American people have demonstrated the desire to obtain a new direction in the application of Federal law in society.

Frequently, the method of application of law is the cause of public mistrust and dissatisfaction rather than the law itself.

In the American Federal system, the goal of law and government is to maximize freedom while providing basic security against crime and foreign or domestic violence.

In the Committee on the Judiciary, therefore, during the 97th Congress the presumption has been and will continue to be against new law until there has been a clear demonstration that new law will, in fact, satisfy the demands of society without unnecessarily restricting citizens.

The Committee is seeking actively to return the focus of the administration of justice in America to the deterrence of crime and the decision of cases and controversies among and between citizens. More particularly, the Committee has undertaken an ongoing effort to remove the Federal courts from the business of attempting to force a reorganization of American society contrary to the wishes of the people.

